85-2084

Supreme Court, U.S.
FILED
JUL 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

HAROLD COFFEY, and JERRY DEAL,
Individually and d/b/a C & D
HARBOR SERVICE; and C & D
HARBOR SERVICE, INC.,

Petitioners,

VS.

JOHN H. PIERSON and his
wife, GYNELLE PIERSON,

Respondents

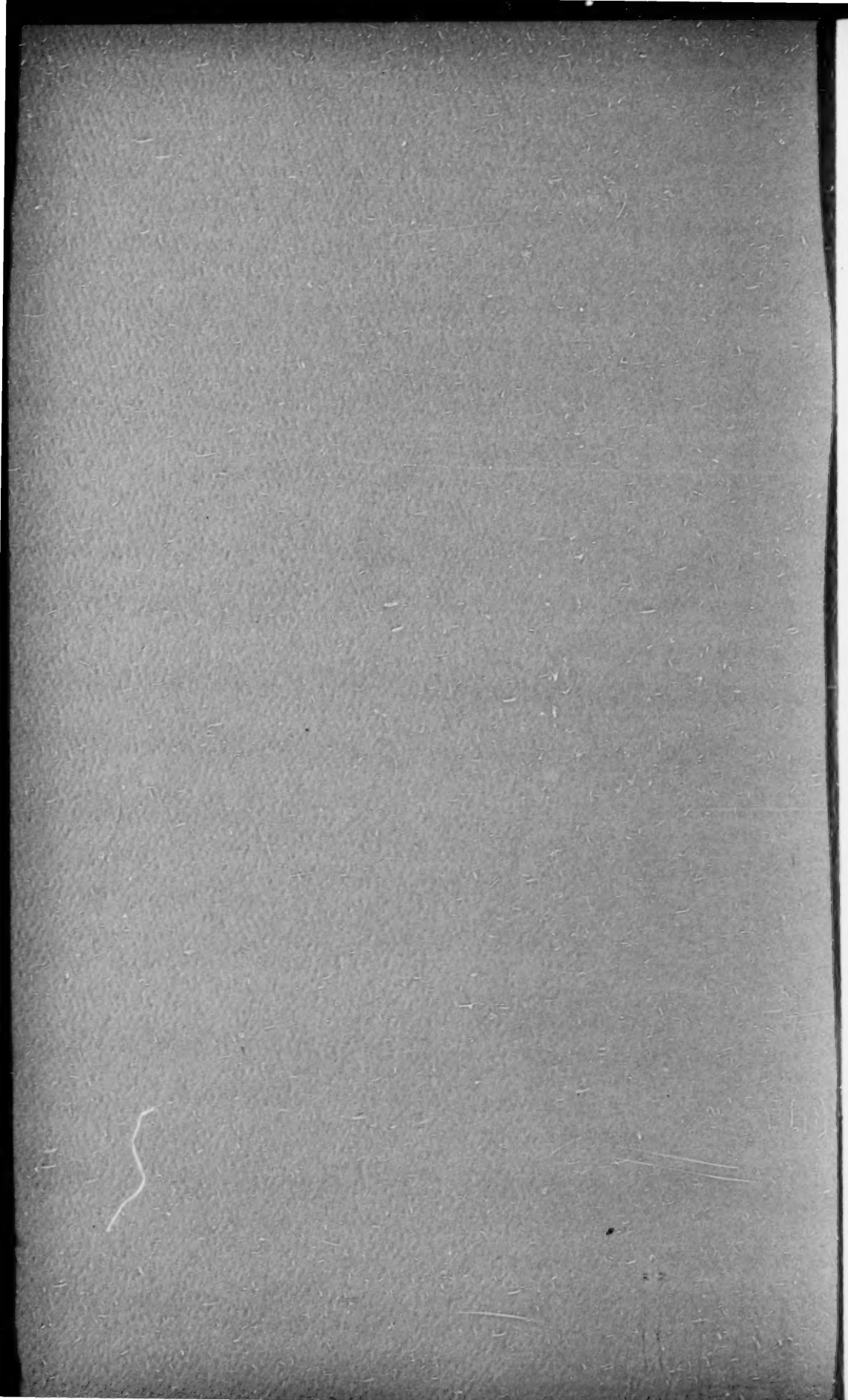
ON WRIT OF CERTIORARI
TO THE COMMONWEALTH
OF KENTUCKY COURT OF APPEALS

RESPONDENTS' BRIEF

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QUESTIONS PRESENTED

I. Does the Public Right of Navigation Allow:

> A Private Individual, Claiming No Title to Land, to Establish a Permanent Installation in the Submerged Land of a Non-Consenting Riparian Owner for the Private Purpose of Operating a Commercial Barge Storage Business for Profit.

II. May the Corps of Engineers, Having No Title to Such Land, Grant a Right to a Private Individual, Also Claiming No Title to Such Land, to Place Boulders or Other Permanent Anchoring Installations, on the Submerged Land of a Non-Consenting Riparian Owner for the Purpose of Constructing and Establishing a Barge Storage Business Thereon, Especially in View of the Disclaimer Placed by the Corps of Engineers in the "Permit" Which Expressly Denies that Such Permit Conveys Any Property Rights in Real Estate or Authorizes Any Injury to Property or Invasion of Rights.

PARTIES TO THE PROCEEDING IN THE STATE COURTS

The following is a list of all parties to the proceeding in the state court whose judgement is sought to be reviewed:

1. Harold Coffey and Jerry Deal, Individually and d/b/a C & D Harbor Service; and C & D Harbor Service, Inc. (Petitioners herein);

2. John H. Pierson and Gynelle Pierson, husband and wife (Respondents herein);

3. Kenneth E. Love, Individually and d/b/a Marine Service (Mr. Love was a co-defendant with Petitioners in the state court proceeding; Mr. Love was held liable as a trespasser in the State Courts. The Corps of Engineers permit granted to him on May 22, 1980 (a copy of which is set out in the Petition at pages F1-F12) was determined by the Kentucky Court of Appeals to NOT convey any property rights nor authorize Mr. Love to place the disputed boulders on Respondents' riparian property without their consent (Petition at page A10). Kenneth E. Love has chosen NOT to apply to this Court for review of that decision).

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STATEMENT OF THE CASE

Petitioners are conducting a permanent commercial barge fleeting/storage business along the shoreline of the Mississippi River in the State of Kentucky.

Respondents are the adjacent riparian owners and own the submerged land to the thread of the River, under Kentucky law; such ownership, however, is subordinate to the public right of navigation and subject to the absolute power of Congress over the improvement of navigable rivers.

Respondents' position, sustained by the State Apellate Courts of Kentucky, is that the permanent anchorage installations in the riverbed necessary to conduct the equivalent of a floating parking lot, is an activity which is not protected by the public right of navigation.

The Kentucky Court of Appeals' decision from which this application is based (Petition for Writ of Certiorari, hereinafter Petition, Appendix A, pages A8 to A9) adopted the reasoning by the Michigan Supreme Court in *Hall v. Wantz*, 57 N.W.2d 462 (Mich. 1953):

> " '(A) riparian owner's property rights to subaqueous lands are subject to an easement in the public for navigation purposes and are subject to the right to anchor as an incident to the right of navigation, nevertheless the right of navigation does not include, as an incident thereto, the right to anchor indefinitely off the riparian owner's premises...
> 'Defendant, in the instant case, is not confining himself to the exercise of the rights of the public generally to navigation, but goes beyond that to engage in a practice not incident to or part of the right of navigation, namely in permanent or indefinite anchoring of his "ark" to plaintiff's subaqueous lands and keeping the same in waters over such lands for the purpose of conducting business there. Id. at 464, 465.'
> "Consistent with these statements, we hold that the activities of appellees Love and C & D are not activities which can reasonably be construed to be within the definition of the 'public right of navigation,' as defined in the reported cases."

While the question of the liability of C & D as breaching tenants and Love as a trespasser has been determined by the Appellate Courts of Kentucky, there has been no trial in the lower court as to damages. The trial court has continued the trial of this matter without date, over objection of Respondents.

As to the specific contractual relations of the parties, the detail of the occurrences, and the surrounding

circumstances, Respondents believe that the introduction recited in the Kentucky Court of Appeals decision (Petition, Appendix A, pages A2 through A5) is factually correct and hereby incorporates such recitation.

Respondents take exception to the misinterpretation placed upon the decision of the Commonwealth of Kentucky Court of Appeals on page 7 of the Petition.

Petitioners would have this court believe that a permanent commercial barge fleeting/storage business occupying 2.6 miles along Respondents' shoreline (8 anchor boulders placed 2,000 feet apart, Petition, Appendix F, page F11) and using permanent anchor installations on Respondents' submerged land constitutes only"...the slightest and most insignificant interference with a riparian landowner's property rights..."

Petitioners were tenants of Respondents and breached their agreement by non-payment of rent while continuing to utilize Respondents' submerged land and conducting the same business in the same location.

Petitioners refused to pay further rent to Respondents on the mistaken belief that if Petitioners used permanent

anchor installations for their business which were affixed to *submerged* land, no consent from the riparian owner would be required; and they notified Respondents in writing to that effect. (Clerk's Record on Appeal below, Vol. I, page 26)

Petitioners continuously refer to the Corps of Engineers Permit as being issued or assigned to Petitioners (Petition, page 5 (assigned to Petitioners), 6, 7 (Petitioner is holder of permit), 8 (permit granted to Petitioners), 9 (permit granted to Petitioners), 10 (Petitioners obtained permit), 11 (Corps permitted Petitioners to place anchor buoys) (trial court weighed Petitioners rights under permit), 12 (Petitioners had obtained a permit from the Corps to place their anchors), 13 (Petitioners as holders of a Corps permit), 15 (permit issued to Petitioners)).

Respondents would note that the Corps of Engineers Permit, to which Petitioners lay great stress, was granted to one Kenneth E. Love d/b/a Marine Service a defendant in the lower court. (See Petition, Appendix F, Pages F1 through F12.)

Mr. Love has decided not to apply to this Court to review the question of whether his Permit grants him property

rights to conduct his private business on the property of another.

The permittee was Mr. Love as is apparent on the face of the Permit itself and no evidence of an assignment or transfer to Petitioners exists.

Petitioners state on page 14 of the Petition that it is a "...fact that Congress has delegated to the Corps of Engineers the authority to determine what is and what is not 'navigation'..."

No authority for usurping such a judicial function was or could be offered by Petitioners.

Absent an assignment, Petitioners have no standing to raise the hypothetical issue of what rights, if any, a Corps of Engineers Permit grants to a permittee or assignee.

Finally, Petitioners claim to be unable to comprehend how it is possible for the Kentucky Court of Appeals to conclude that Petitioners' permanently anchored floating parking lot is not a use within the "public right of navigation" and at the same time say that the purpose of a Corps of Engineers permit is to safeguard the public in exercising their (the public's) right of navigation.

The conclusion reached by Petitioners is that if their business activity is not a use permitted under the public right of navigation, it necessarily follows that the public right of navigation has disappeared in its entirety.

On a more realistic note, however, as stated succinctly by the Kentucky Court of Appeals: (Petition, Appendix A, pages A7 to A8)

> "Appellees (C & D, petitioner herein) are not themselves engaged in activities which constitute 'navigation,' as defined by the relevant authorities. Moreover, it is clear that appellees' activities do not fall within the purview of the public's right to temporarily anchor vessels in a navigable waterway. Here, Love dropped boulders on appellants' riverbed in order to provide a permanent anchorage facility for C & D's offshore fleeting service business, and to enable him to charge and earn rental fees to be paid by C & D. Further, C & D is not utilizing Love's anchor buoys to temporarily anchor their own vessels for recreational or commercial purposes. Rather, they are using them to conduct a commercial business for profit which, in exchange for a fee, makes permanent overnight anchorage facilities available to barges using the river. Thus, the situation in the instant action is factually much different from the typical situation, in which a vessel traveling the river for commercial or recreational purposes drops anchor for some temporary period as an incident of its journey on the river."

REASONS WHY THE PETITION SHOULD NOT BE GRANTED

1. *The Petition for a Writ of Certiorari Is Premature Since the Trial On Damages Has Yet To Be Held*

Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 67, 92 L.Ed. 1712, 68 S.Ct. 972 (1948) is in point as to this issue:

> "Thus the requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up—for example, where liability has been determined and all that needs to be adjudicated is the amount of damages. *Bruce v. Tobin*, 245 U.S. 18; *Martinez v. International Banking Corp.* 220 U.S. 214, 223; *Mississippi Central R. Co. v. Smith*, 295 U.S. 718." (See also *Georgia Railway Co. v. Decatur*, 262 U.S. 432, 437, 43 S.Ct. 613, 26 L.Ed. 1065 (1923))

Respondents are unaware of the federal questions that Petitioners may raise at the trial on damages but with initiative and imagination, a second climb up the appellate ladder by Petitioners can be foreseen.

In four years of this landlord-tenant litigation, Respondents have been denied judgement for rent, damages, and attorney fees as provided in the lease agreement. To grant the application for a Writ of Certiorari

prior to a final determination unduly interferes with concluding this state litigation.

2. *The Holder of the Corps of Engineers Permit, Kenneth Love, Has Elected Not To Appeal the State Court Decision That His Permit Does Not Grant Him Any Property Rights in Submerged Land, And Petitioners Should Not Be Allowed To Raise Such Defense in Love's Behalf.*

As the Kentucky Court of Appeals stated in the instant case:

> "However, two months later C & D entered into a separate agreement with appellee Kenneth Love (Love), who had obtained a permit from the Army Corps of Engineers authorizing the placement of anchor buoys. The agreement provided that Love would place several anchor buoys on the riverbed off appellants' shoreline. Further Love agreed in exchange for a stated consideration that C & D would have the exclusive right to use the buoys for a period of five years. Pursuant to appellees' agreement, Love proceeded to place several twenty- to thirty-ton rock boulders on the riverbed off appellants' shoreline, and attached mooring cables and anchor buoys to them. Appellants did not consent to the placement of the boulders." (Petition, Appendix A, page A3)

In any event the Kentucky Court of Appeals held that the Corps of Engineers Permit did not convey any property right. As stated by that Appellate Court:

"Love further contends that his placement of the boulders was lawful because it was authorized by a permit issued to him by the Army Corps of Engineers. We disagree. The requirement that a person must obtain a permit before he or she may place obstructions in the river does not confer any interest in riparian property upon the recipient of the permit. Rather, this requirement merely safeguards the public right of navigation by ensuring that there will be proper regulation and placement of any obstructions submerged in navigable waters. See, *Norfolk Dredging Company v. Radcliff Materials, Inc.* 264 F.Supp. 399, 402 (1967). Moreover, the permit obtained by Love expressly stated on its face that it did not convey any interest in property. Hence, contrary to Love's contention, it is clear that the permit did not authorize him to place the disputed boulders on appellants' riparian property without their consent."

Or, as more succinctly stated by trial judge, Willard Paxton:

"That Corps of Engineers Permit didn't mean diddly squat."
(Transcript of Hearing on December 14, 1982, page 17)

3. *The Decision That A Private Individual Claiming No Title to Land Has No Right to Establish Permanent Commercial Installations in the Submerged Land of a Riparian Owner for the Private Purpose of Operating a Barge Storage Business for Profit Is Consistent With All Reported Federal and State Decisions.*

a. The title to the beds of navigable rivers of the United States is either in the States in which the rivers are situated, or in the riparian owners, depending upon the local law. *United States v. Chandler-Dunbar Water Power Co.,* 229 U.S. 53, 62, 57 L.Ed 1063, 1075, 33 S.Ct. 667, 672 (1913)

b. In the Commonwealth of Kentucky, a riparian owner owns the land to the thread of the stream. *Whitson v. Morris,* Ky., 201 S.W.2d 193 (1946); *Hough v. Ohio Rivers Sand Company,* Ky., 288 S.W.2d 655 (1956); *Wilson v. Watson,* Ky., 132 S.W. 563, 141 Ky. 324 (1910); *Berry v. Snyder,* Ky., 3 Busch 266, 66 Ky. 266 (1867); *Barr v. Spalding,* D.C.W.D. Ky., 46 F.2d 798, 799 (1928); Trial Court Judge Paxton, Transcript of Hearing on December 14, 1982, pages 15, 39-40; Transcript of Hearing of February 1, 1984, page 14

c. The title of the riparian owner to the bed of a navigable stream is a qualified one, and subordinate to the public right of navigation and subject to the absolute power of Congress over the improvement of navigable rivers. *United States v. Chandler-Dunbar Water Power Co.,* supra; Trial Court Judge Paxton, Clerk's Record on Appeal below, Vol. VI, page 824

Natcher v. City of Bowling Green, Ky., 95 S.W.2d 255, 257 (1936): "In and on a navigable stream, the title of a riparian owner...particularly of the bed...is a qualified one, for it is subject to the dominant rights of the public in the stream. Navigable rivers are and always have been regarded as public highways."

Paducah Sand & Gravel Co. v. Central Home Telephone & Telegraph Co., Ky., 273 S.W. 481, 482, 209 Ky. 756 (1925): "The use of navigable streams is analogous to that of the use of public highways, and, concededly, the right of navigation is paramount to any other rights that may be acquired in the use of such streams."

d. This riparian right is a valuable property right and though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law; and if necessary that it be taken for the public good, upon due compensation. *Yates v. Milwaukee,* 10 Wall. 497.

e. Federal and state decisions from other jurisdictions are consistent with the holding of the Kentucky Court of Appeals in the instant case:

Boathouses held in floating position by anchors in submerged land, held to be a trespass on submerged land owned by riparian owner. *Steel Creek Development Corporation v. James,* N.C. App., 294 S.E.2d 23 (1982)

"Owner of the bed of a river is certainly entitled to prevent permanent structures on the surface of the water which preclude other uses of the bed, whether or not they actually rest on the bed itself." *Brusco Towboat Co. v. Oregon,* Or., 589 P.2d 712 (1978)

In Illinois, a contractor anchored a spud barge on the bed of the river for the purpose of extended construction without permission of the riparian owner. The Federal District Court held that such a use was not within the navigational servitude and constituted a trespass upon the submerged land of the riparian owner. The Court stated specifically that a riparian landowner holds exclusive mooring and wharfing rights incident to the ownership of title to the middle of the

main channel of the Mississippi River. *Fruin-Colnon Corp. v. Vogt,* USDC, SD Ill., 500 F.Supp. 606 (1980)

In the California case of *County of Marin v. Roberts,* Ca. App., 84 Cal. Rptr. 425 (1970) defendant maintained drydocks on submerged land of a non-consenting owner, claiming its drydocks were within the public right of navigation and also that defendant had received a permit from the Corps of Engineers.

At page 430 the Court stated:

> "Wise's contention overlooks the fact that *even if the Corps of Engineers had issued a permit here, such a permit would in no way inhibit the rights of the property owner, the County, from ejecting Wise as a trespasser.* A Corps of Engineer's permit *merely safeguards the public right of navigation - it does not confer any interest in property. (Norfolk Dredging Company v. Radcliff Materials, Inc.,* D.C., 264 F.Supp. 399, 402). Similarly, the anchorage permits issued by the Coast Guard relate only to promoting safe navigation and confer no property interest (33 C.F.R. 110.214, pages 347-348)." (emphasis supplied)

To the same effect is the Oregon case of *State v. Graham,* Ore., 26 P.2d 46 (1933) at page 52:

> "The license which the United States engineer issued to Barbey (pursuant to 33 USCA 403; 30 Stat. 1151) authorizing him to proceed with the construction of the wharf was a mere declaration that

> the structure would not interfere with or be detrimental to navigation, and was not a declaration by authority of Congress that he could erect the wharf without first obtaining authority from the state of Oregon (cases)."

In *Driesbach v. Lynch,* Id., 234 P.2d 446 (1951), the Idaho Supreme Court held that since the title to the bed of a navigable lake was not vested in the United States, the Secretary of War could not grant rights to third parties to maintain docks and pilings within the littoral boundaries of another littoral owner, thereby interfering with the rights of such littoral owner, and the permit issued by the Secretary was inadmissible as evidence to defend against trespass.

The State of Wisconsin has also expressed its position with respect to what is and what is not "navigation."

After stating the rule in Wisconsin that the owner of the banks of the stream is the owner of the bed, the Court in *Munninghoff v. Wisconsin Conservation Commission,* Wis., 38 N.W.2d 712, 255 Wis. 252 (1949) stated:

> "In general, the rights of the public to the incidents of navigation are boating, bathing, fishing, hunting and recreation (citations) ...Appellant asserts that float trapping does not require the use of the bottom. However, floats for float trapping are always anchored to the bottom and any method of anchoring or securing a float would, of necessity,

require the use of land on the bottom...To float trap in navigable water constitutes a trespass upon the submerged land for which the trespasser may be prosecuted by the owner of the said land and enjoined from using public water for that purpose...

"Appellant also asserts that the right of navigation includes the incidental use of the bottom. This is true where the use of the bottom is connected with navigation, such as walking as a trout fisherman does in a navigable stream, boating, standing on the bottom while bathing, casting an anchor from a boat in fishing, propelling a duck boat by poling against the bottom, walking on the ice if the river is frozen, etc. These have nothing in common with trapping because the latter involves the exercise of a property right in the land or bottom."

This Court, in an extensive opinion, stated in *St. Anthony Falls Water Power Company v. St. Paul Water Commissioners,* 168 U.S. 349 (1897) at 364:

"In *Kaukauna Water Power Company v. Green Bay & Mississippi Canal Co.,* 142 U.S. 254 (1891), Mr. Justice Brown, in delivering the opinion of the court, said at page 271: 'It is the settled law of Wisconsin, announced in repeated decisions of its Supreme Court, that the ownership of riparian proprietors extends to the centre or thread of the stream, subject, if such stream is navigable, *to the right of the public to its use as a public highway for the passage of vessels* (citing cases). In *City of Janesville v. Carpenter,* 77 Wisconsin, 288, 300, it is said of the riparian owner: He may construct docks, landing places, piers and wharves out to the navigable waters, if the river is navigable in fact, ...Subject to these restrictions, *he has the right to use his land under water the same as above water.* It is his

private property under the protection of the Constitution, and it cannot be taken, or its value lessened or impaired even for public use, "without compensation," or "without due process of law," and it cannot be taken at all for any one's private use.' " (emphasis supplied)

A recent Wisconsin case, very similar on its facts to the instant situation is *Wisconsin v. Bleck,* Wis., 388 N.W.2d 492 (1983) in which a non-riparian owner claimed the right to maintain anchors in the bed of a navigable lake for the purpose of mooring a water ski jump. The discussion of the Wisconsin Supreme Court appears on page 498:

> "*The only use of the water that was regulated in this case was one dependent upon a structure secured to the lake bottom.* Through the enforcement of sec. 30.12, *the state seeks not to preclude the petitioners' recreational use of Bass Lake but only to control petitioners' unauthorized placement of a structure on the bed of a navigable lake.* The fact that the state's regulation of the use of the lake bed pursuant to its authority under sec. 30.12 may have an incidental effect on the petitioners' recreational use of the lake does not amount to a violation of the public trust doctrine." (emphasis supplied)

The Michigan case of *Hall v. Wantz,* supra, uses the analogy of a Vermont case to dispose of the arguments of the permanently anchoring businessman that since the

traveling public is convenienced by his services, he must be engaged in navigation. The Response appears on page 464:

> "In *Furlong v. Deringer, Inc.*, 111 Vt. 220, 13 A.2d 186, 187, the court in a like case granted injunctive relief and said: 'That the public is entitled to a proper viatic use of a highway is too well established to need argument or citation of authority. However, this fact does not avail the defendant in this case...It (defendant) is here *claiming right to occupy plaintiff's land (within the highway boundaries) for the purpose of conducting a busines for its private gain and profit.* It makes *an attempt to justify its claim upon the ground that the nature of its business is such that the travelling public is convenienced thereby.* This same argument may be used with equal force to one who sets up on another's land within highway limits a gas station, garage, restaurant and dozens of other business stands. Here the *defendant is attempting to take another's property for its private use against the will and without the consent of the owner.* This cannot be done. (Citing authorities)' " (Emphasis supplied)

Authorities are numerous for the proposition that the public right of navigation includes only a *temporary* right of anchorage as an incident necessary to the enjoyment of the right of navigation.

Anderson v. Reames, 204 Ark. 216, 161 S.W.2d 957 (1942)

Kuramoto v. Hanoda, 30 Haw. 841 (1929)

Hall v. Wantz, 336 Mich. 112, 57 N.W.2d 462 (1953)

Patterson v. Dust, 190 Mich. 679, 157 N.W. 353 (1916)

West v. Smith, 95 Idaho 550, 511 P.2d 1326 (1973)

1 Fornhon, *Water and Water Rights*, Sec. 46 (1904)

People v. Kraemer, 164 N.Y.S. 423, 429 (1957):

"The harbor is located in a region in which there is a substantial amount of commercial traffic of a type that might utilize the harbor for purposes of navigation as, for example, to lay up overnight in the course of a journey through the Sound."

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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